IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5001

CLIFF ANDERSON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Cliff Anderson, respectfully shows:

OPINIONS BELOW

The initial opinion below (with one Judge dissenting) was rendered by the United States Court of Appeals for the Fifth Circuit under the style of *United States v. Doolittle, et al*, No. 72-3263, and was filed on

February 14, 1975. This opinion is reported at 507 F. 2d 1368 and is attached hereto as Appendix "A".

Following *en banc* consideration a final opinion (with six Judges dissenting) was filed on September 2, 1975 and is attached hereto as Appendix "B".

STATEMENT OF JURISDICTION

Following the initial opinion, a timely petition for rehearing and suggestion for rehearing *en banc* was filed and was granted on April 7, 1975. A copy of this order is attached hereto as Appendix "C". The judgment on the opinion of the *en banc* court was entered on September 2, 1975, and is attached hereto as Appendix "D". Within 30 days after the entry of the September 2, 1975, opinion and judgment, this petition for certiorari was filed in accordance with the time requirement specified in rule 22(2) of this Court.

Jurisdiction of this Court to review the judgment ir question is conferred by 28 U.S.C. §1254(1) in that said judgment was rendered by a United States Court of Appeals in a criminal case.

QUESTION PRESENTED

1.

Whether an application and order authorizing a wire interception is invalid, thereby requiring suppression of seized conversations, as to a person whose identity is well known to the government and who is not named in the application and order for the wire interception

even though there is probable cause to believe that he is committing the offense to be investigated and that his telephone conversations will be seized and used against him as evidence in a criminal trial.

STATUTES INVOLVED

Section 2518 of Title 18 of the United States Code, provides in pertinent part:

> "(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction . . . . Each application shall include the following information:
>
> (b)(iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted.
>
> "(4) Each order authorizing or approving the interception of any wire or oral communication shall specify —
>
> (a) the identity of the person, if known, whose communications are to be intercepted.
>
> "(10)(a) Any aggrieved person in any trial . . . may move to suppress the contents of any intercepted wire or oral communication, or

evidence derived therefrom, on the grounds that —

> (i) the communication was unlawfully intercepted;
> (ii) the order or authorization or approval under which it was intercepted is insufficient on its face; or
> (iii) the interception was not made in conformity with the order of authorization or approval.

. . . If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter."

Section 2510 of Title 18 of the United States Code provides in pertinent part:

> "(11) 'Aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

STATEMENT OF THE CASE

Proceedings and Disposition in the Court Below

This case arises from a grand jury indictment returned in the Middle District of Georgia against nine defendants including Petitioner Cliff Anderson. (R-2-23)

Count One of the indictment charged all of the defendants except one Kilgore with conspiracy to violate 18 U.S.C. §1952 through the use of telephone facilities in interstate commerce to promote gambling activity and 18 U.S.C. §1084 by transmitting through wire communications in interstate commerce gambling information. Counts Two through Nine alleged substantive violations of 18 U.S.C. §1952 by all defendants except Kilgore. (R-12-19) Counts Ten through Twelve charged only the defendants Masterana and Doolittle with substantive 18 U.S.C. §1084 violations. (R-20-21) Counts Thirteen and Fourteen charged the defendants Doolittle and Kilgore with substantive 18 U.S.C. §1952 violations. (R-21-22) Finally, Counts Fifteen and Sixteen charged only the defendant Doolittle with substantive 18 U.S.C. §1084 violations. (R-23) All defendants entered pleas of not guilty to this indictment. (R-24-26)

Thereafter, various motions were filed, including timely motions to suppress. (R-402-427, 507-513, 892-910) These motions were overruled by the district court. (R-868-870, 942-959)

Petitioner Anderson waived trial by jury and, after trial, was found guilty on Counts 1, 2, 3, 5, 7, 8, and 9 of the indictment and not guilty on Counts 4 and 6. (R-2010-2017) The Court handed down a sentence of six months imprisonment as to Anderson (R-2079) and by timely notice of appeal (R-2085) his case was appealed to the United States Court of Appeals for the Fifth Circuit.

A three-judge panel of the Court of Appeals for the Fifth Circuit affirmed Petitioner Anderson's convic-

tion by a divided vote of 2 to 1 on February 14, 1975. (See, App. "A") Petitioner was thereafter granted a hearing *en banc* (see, App. "C") and his conviction was again affirmed by a divided vote of 8 to 6 in an opinion filed on September 2, 1974. (See, App. "B")

With the filing of this timely petition for certiorari, Petitioner's case is properly before this Court.

Statement of Facts

The factual basis for the prosecution in this case arose as the result of wire interceptions by the government under a court order. This order was issued upon an application filed by Assistant U. S. Attorney Charles Erion pursuant to 18 U.S.C. §2516 and 2518 (R-515-519). Attached to this application was an affidavit of Gary W. Hart, a special agent with the Federal Bureau of Investigation. (R-520-534)

The application sought authorization to intercept wire communications of "Billy Cecil Doolittle *and others as yet unknown*" concerning offenses committed and being committed "by Billy Cecil Doolittle *and others as yet unknown.*" (R-516) The affidavit of Gary Hart alleged facts as to probable cause concerning "Billy Cecil Doolittle *and others as yet unknown*" (R-516-517); and, the affiant stated that he believed that probable cause existed as to "Billy Cecil Doolittle *and others as yet unknown.*" (R-518)

On the basis of the application "and on the basis of the affidavit of special agent Gary Hart" Erion requested an order pursuant to 18 U.S.C. §2518 authoriz-

ing the F.B.I. to intercept communications on the specified phones as to "Billy Cecil Doolittle *and others as yet unknown.*" (R-518-519)

The lengthy affidavit of F.B.I. agent Gary W. Hart, which was incorporated in the application, stated in relevant part that: (1) the defendant Will Sanders was a *full partner* with the defendant Doolittle in the bookmaking operation; (2) Doolittle and Sanders disseminate the "line" by telephone; (3) parties contacted by Doolittle and his associates in this manner are *Cliff Anderson* of Columbus, Georgia and *Billy Baxter* of Augusta, Georgia (R-520); (4) defendants Anderson and Baxter were engaged in accepting wagers; "Doolittle was *associated* with Cliff Anderson of Columbus, Georgia and Billy Baxter of Augusta" in wagering and obtaining the "line" by phone and supplies it to Anderson and Baxter by phone (R-521); (5) the toll statements as to the "rotary combination for the November 28, 1969, through July 28, 1970, billing periods . . . disclosed that certain numbers were called frequently such as numbers which *Cliff Anderson* and *William E. Baxter, Jr.* subscribed to" (R-528); (6) there were 678 calls to the phones of Cliff Anderson during this period and 853 to the phones of William E. Baxter (R-527-528); (7) the defendant Cliff Anderson had advised the F.B.I. on September 20, 1967, that he was a local bookmaker in Columbus, Georgia (R-528); (8) William E. Baxter had advised the F.B.I. that he was a bookmaker in Augusta, Georgia (R-530); and (9) within minutes after Doolittle received the "line" calls were being placed to phones of defendants Anderson and Baxter. (R-530-531)

After reviewing the Erion application and the Hart affidavit, the Court issued two orders, one "authorizing interception of wire communications" (R-535) and another "authorizing use of a pen register". (R-539)

The wire communication order in relevant part stated that: (1) it was issued pursuant to 18 U.S.C. §2518; (2) the Court found "probable cause to believe that Billy Cecil Doolittle *and others as yet unknown* have committed and are committing offenses . . . by means of an interstate wire facility (R-535); (3) the F.B.I. agents were accordingly authorized to "intercept wire communications of Billy Cecil Doolittle *and others as yet unknown* . . . to and from the Sportsman's Club numbers. (R-537)

The pen register order stated that: (1) there is probable cause as to Billy Cecil Doolittle *and others as yet unknown*.

Following issuance of the order authorizing the wire interception, numerous conversations were intercepted and were used by the government to secure convictions against Petitioner Anderson and the other co-defendants upon the trial of their case.

Basis for Federal Jurisdiction in Trial Court

The indictment in this case charged violations of 18 U.S.C. §1952, §1084 and §371, all of which are federal offenses and which were properly instituted in the Macon Division of the United States District Court for the Middle District of Georgia.

REASONS FOR ALLOWANCE OF THE WRIT

The decisions rendered by the United States Court of Appeals for the Fifth Circuit in this case are in conflict with decisions in three other Courts of Appeal, see, *U.S. v. Bernstein*, 509 F. 2d 996 (4th Cir. 1975), petition for cert. filed 43 U.S.L.W. 3637 (U.S. May 27, 1975, No. 74-1486); *U.S. v. Donovan*, 513 F. 2d 337 (6th Cir. 1975); *U.S. v. Moore*, 513 F. 2d 485 (D.C. Cir. 1975), and the decision of this Court in *U.S. v. Kahn*, 415 U.S. 143 (1974).

ARGUMENT

Consideration of the question presented by this petition has worked not only a conflict between the circuits and with a decision of this Court, but has split the Fifth Circuit Court almost down the middle (8 to 6). The issue is one of immense importance to the application and interpretation of the terms of the omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510-2520, and should be finally resolved by this Court in order to insure the Act's uniform application and its interpretation in a manner fully consistent with Congressional intent.

The majority position of the court below effectively waters down and weakens the identity requirements found in §2518(1)(b) (iv) and §2518(4)(a) by the application of the doctrine of substantial compliance and harmless error, neither of which were ever intended by Congress to apply to a situation such as this one. An "aggrieved person" is defined by the Act (18 U.S.C. §2510(11)) in the broadest and most uncertain terms to

include anyone whose conversation is seized by an interception or against whom an interception is directed. Such a person is authorized by the very terms of the Act (18 U.S.C. §2518(10)(a)) to file a motion to suppress and no further showing of prejudice is necessary. This Court's decision in *Katz v. U.S.*, 389 U.S. 347 (1967) clearly established antecedent judicial review and approval as a Constitutional precondition to electronic surveillance. The failure to secure such approval was, in and of itself, sufficiently prejudicial to warrant suppression. Congress was mindful of this decision and its requirements when the Act in question was passed. See, Senate Report No. 1097, 1968 U.S. Code Cong. and Adm. News, Vol. II, p. 2189-2190. It seems obvious that the statutory provisions in question were designed to force the government to seek prior judicial approval as required by the Fourth Amendment and *Katz* and that the failure to do so invalidates any subsequent seizure of wire conversations. In fact, Congress apparently intended to impose even a more stringent requirement as to identity of the individual whose communications are to be intercepted. In drafting the statutory provisions in question, the identity requirements of arrest warrants were considered and specifically referred to in the legislative history of the Act. See, Senate Report No. 1097, 1968 U.S. Code Cong. and Adm. News, Vol. II, p. 2191, where the decision of this Court in *West v. Cabell*, 153 U.S. 78 (1894) is relied upon as illustrating the nature of the Act's identity requirement.

An approach more in line with the precise wording of the statute and the mandate of the Fourth Amendment as interpreted by *Katz*, was taken by the Court in

Bernstein, supra, in dealing with the government's lack of prejudice argument:

> "We conclude from the unequivocal language of Title III that Congress intended any unlawful invasion of an aggrieved person's privacy to be sufficient harm in itself to require suppression.
>
> 'Prejudice is not an element of the definition' (of an aggrieved person)." 509 F. 2d at 1004.

Under *Bernstein*, the fact that Petitioner Anderson was not named in the application or order is alone sufficient prejudice to support his motion to suppress. This view is in accord with *Katz* and *Donovan, supra*.

Not only is the decision below in direct conflict with decisions in other circuits, but it is directly contrary to the holding of this Court in *U.S. v. Kahn*, 415 U.S. 143 (1974) where Justice Stewart stated that:

> "We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is 'committing the offense' for which the wiretap is sought." 415 U.S. at 155

No substantial effort was made by the majority court below to come to grips with this conclusion as reached in *Kahn* and in effect they chose to ignore it and leave an apparent and glaring conflict between the decision

in this case and the one in *Kahn*. Also at odds with the majority opinion in this case and in line with *Kahn* is the decision of the Circuit Court for the District of Columbia in *U.S. v. Moore, supra*. See also, *U.S. v. Donovan, supra*.

Only a cursory examination of the Erion application for a wire interception order and its attachments reveals that beyond any doubt the government had probable cause at the time the application was filed to believe that Petitioner Anderson was committing the offense which they were investigating. The failure to name Anderson in the application and order is clearly violative of the terms of the statute and of the directive in this regard found in *Kahn*. There is no compliance with the spirit of the decision in *Katz* and the Congressional history behind the provisions in question has not been seriously considered in arriving at the intent of the body which drafted the Act in question. The Fifth Circuit Court of Appeals cannot agree among its members nor can it find common ground with at least three other Circuit Courts of Appeal. The resulting conflict and uncertainty in the law should be resolved by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case presents the classic conflict contemplated by Rule 19 of this Court and that it fully justifies review by certiorari. The petition for certiorari should accordingly be granted and this case should be consolidated for consideration along with *Bernstein, supra*.

Resepctfully submitted,

ADAMS, O'NEAL,
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STONE & BROWN

Manley F. Brown
Counsel of Record for
Petitioner, Cliff Anderson

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Petition for Writ of Certiorari and attachments by mailing copies of same, with proper postage affixed and via airmail, to Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C., 20530; Mr. Oscar B. Goodman, 230 Las Vegas Boulevard, South, Las Vegas, Nevada, 89101, and by regular mail to Floyd Buford, P. O. Box 755, Macon, Georgia, 31202, and Wesley R. Asinof, 3424 First National Bank Building, 2 Peachtree Street, Atlanta, Georgia.

This ____ day of September, 1975.

Manley F. Brown,
Counsel of Record for
Cliff Anderson

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

versus

Billy Cecil DOOLITTLE, William Augustus Sanders, Jr., Ernest Massod Union, Julian Wells Whited, Frank Joseph Masterana, Cliff Anderson, Darnice T. Malloway, and William E. Baxter,
Defendants-Appellants.

No. 72-3263

United States Court of Appeals,
Fifth Circuit.

Feb. 14, 1975.

Appeals from the United States District Court for the Middle District of Georgia.

Before THORNBERRY, AINSWORTH and RONEY., Circuit Judges.

RONEY, Circuit Judge:

All defendants were convicted in a non-jury trial for conspiracy to violate 18 U.S.C.A. §§ 1084 and 1952, which prohibit the use of interstate wire and telephone facilities to carry on illegal gambling operations. All defendants were similarly convicted of substantive violations of § 1952, and defendants Masterana and Doolittle were also convicted of sub-

stantive violations of § 1084. The convictions were obtained primarily by the use of conversations intercepted by a wiretap authorized by the district court under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510-2520, and the fruits of searches for which the wiretap provided probable cause. Recognizing that without this evidence the Government's case would be substantially weakened, if not destroyed, defendants mounted a multifaceted assault on the wiretap in a motion to suppress the evidence in the district court. The district court denied the motion, and the convictions followed. The attack has been renewed in this Court, but like the district court, we find no infirmity warranting suppression of the evidence and affirm all convictions.

Defendants first attack the wiretap provisions of the Omnibus Crime Control Act as unconstitutional for violations of the First, Fourth, Fifth and Sixth Amendments. We have recently upheld this portion of the statute against a similar constitutional attack. United States v. Sklaroff, 506 F.2d 837 (5th Cir. 1975).

Next the defendants assert that various procedural irregularities in the authorization of the wiretap request within the Justice Department require that the evidence be suppressed. *See* 18 U.S.C.A. § 2515. The Supreme Court of the United States has ruled that irregularities of the kind asserted here do not render the communications "unlawfully intercepted" or the interception request "insufficient on its face." United States v. Chavez, 416 U.S. 562, 94 S.Ct. 1849, 40 L.Ed.2d 380 (1974); *see* 18 U.S.C.A. §§ 2518(10)(a)(i), 2518(10)(a)(ii). At the time this case was argued, the

Supreme Court had not decided *Chavez* and appellants relied on the Ninth Circuit decision in that case. United States v. Chavez, 478 F.2d 512 (9th Cir. 1973). The Supreme Court modified that portion of the Ninth Circuit decision upon which the appellants relied. We find nothing in this case to warrant a different result than that determined by the Supreme Court in *Chavez*. Considering the other information contained in the Interception Order Authorization, such as the location of the phones to be tapped, address of the Sportsman's Club, and its owner, we find the one incorrect digit in one of the four telephone numbers listed therein to be an immaterial variation from the actual, correct number for which the tap was requested of the district court. *Cf.* United States v. Chavez, *supra*.

The procedure of filing the affidavits of the Attorney General and his subordinates, as a method of proving the administrative history of the specific authorization in this case, is identical to that used in *Chavez*. There is no constitutional infirmity in the district court's refusal to require more of the Attorney General on this narrow issue of fact.

Appellants contend that the use of a "pen register," as in this case, is not specifically authorized by Title III and must, therefore, be considered rejected by Congress as an appropriate investigative tool. The Act does not prohibit the use of pen registers and we do not view its use in this case, based upon probable cause and with a separate authorization from the district court, as being constitutionally offensive. *See* United States v. Giordano, 416 U.S. 505, 553-554, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) (Powell, joined by the Chief

Justice, and Blackmun and Rehnquist, JJ., concurring in part and dissenting in part); United States v. Finn, 502 F.2d 938 (7th Cir. 1974); United States v. Brick, 502 F.2d 219, 223 (8th Cir. 1974); *cf.* United States v. Falcone, 364 F.Supp. 877 (D.N.J.1973), aff'd, 500 F.2d 1401 (3rd Cir. 1974).

Certain defendants assert that the Government lacked probable cause to believe that their conversations would be intercepted by the wiretap. They contend that this lack of probable cause should render the tap unlawful as to them. A similar argument has been rejected by the Supreme Court in United States v. Kahn, 415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974). At oral argument, the appellants relied upon the Seventh Circuit decision in United States v. Kahn, 471 F.2d 191 (7th Cir. 1972). The reversal by the Supreme Court of the Seventh Circuit decision is dispositive of the issue as framed here. The statute does not require that there be probable cause as to all persons whose conversations are intercepted. *See* 18 U.S.C.A. § 2518(1)(b)(iv). Since the wiretap in this case was validly issued, the wiretap conversations of those individuals not known to be involved in criminal activity at the time of the court authorization may be used against them.

The wiretap authorization referred to "Billy Cecil Doolittle and others as yet unknown." Anderson and Baxter contend that the Government had reasonable cause to believe that their conversations would be intercepted. Relying on certain language in the Supreme Court's opinion in *Kahn*, they argue that, not being "unknown," they should have been named in the authorization. They contend that since they were not

named, the wiretap order was illegal as to their conversations. The same argument could be made for Sanders. We reject this argument. The defendants neither allege nor demonstrate any prejudice to them in not being named in the authorization. The Government contends that its agents had personal knowledge, as opposed to information, to support probable cause as to illegal activity only of Doolittle, the coowner of the Sportsman's Club, the establishment wherein the telephones were located and to which the telephone bills were sent. All defendants received an inventory of the intercepted conversations, were allowed to listen to the tapes and received transcripts of the conversations prior to use against them at trial, as if they had been named in the order. Most of the conversations of each defendant were with Doolittle, the person named in the order. There is no indication of bad faith or attempted subterfuge by the Government in its wiretap application. The application and affidavit delineated specifically the information expected to be gathered from the tap. We hold there was substantial compliance with the requirements of the Act, and that the failure to name other defendants does not render the evidence obtained as to them inadmissible under 18 U.S.C.A. § 2518(10)(a).

The last general attack by all defendants is that the wiretaps exceeded the scope of the interceptions authorized by the court order. The testimony by the monitoring agent at the suppression hearing reveals that they listened to each call only long enough to determine whether in their judgment it could be one dealing with gambling as authorized to be intercepted by the district court. Only those calls which the

agents reasonably believed were related to gambling were recorded on tape. There is no question that some irrelevant and personal portions of gambling conversations were intercepted or that certain nonpertinent conversations were intercepted. But this is inherent in the type of interception authorized by Title III, and we do not view the simple inclusion of such conversations, without more, as vitiating an otherwise valid wiretap. The procedure testified to by the agents appears a reasonable method for complying with the order of the district court, in accord with the statutory mandate that the interception be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Title III. United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), cert. denied, 417 U.S. 918, 94 S.Ct. 2623, 41 L.Ed.2d 223 (1974).

The district court specifically found that defendants Malloway and Baxter lacked actual knowledge of the use of interstate facilities in the gambling operation. This lack of specific knowledge is legally irrelevant. The words of § 1952 do not require specific knowledge of the use of interstate facilities and we agree with the decisions in other Circuits that such knowledge is not a prerequisite to criminal liability thereunder. *See, e. g.*, United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971); United States v. Hanon, 428 F.2d 101 (8th Cir. 1970), cert. denied, 402 U.S. 952, 91 S.Ct. 1608, 29 L.Ed.2d 122 (1971); United States v. Miller, 379 F.2d 483 (7th Cir.), cert. denied, 389 U.S. 930, 88 S.Ct. 291, 19 L.Ed.2d 281 (1967).

Anderson individually challenges the district court's handling of his evidentiary objection to certain of the intercepted conversations as hearsay. The trial court's rulings on this matter shows a clear understanding of the law on the exception to the hearsay rule which applies to statements made by co-conspirators in furtherance of the conspiracy. *See, e. g.*, United States v. Register, 496 F.2d 1072, 1078-1079 (5th Cir. 1974); United States v. Williamson, 482 F.2d 508, 513 (5th Cir. 1973). An examination of the record shows sufficient independent evidence of the existence of a conspiracy to which Anderson was a party to warrant the introduction of the hearsay conversations against him.

Affirmed.

THORNBERRY, Circuit Judge (concurring in part and dissenting in part):

I concur in the decision affirming the convictions of Doolittle, Malloway, and Masterana. With regard to appellants Anderson, Baxter, and Sanders, however, I would reverse; hence I respectfully dissent from so much of the majority opinion as affirms their convictions.

I do so not without reluctance, for the majority admirably attempts to demonstrate that the latter defendants were not prejudiced by the procedure under which their intercepted telephone communications were used against them at trial. That is while these defendants enjoyed along with every member of the public a Congressionally-recognized interest in in-

dividual privacy, their interest must be balanced against the government's interest in enforcing laws relating to the crimes enumerated in 18 U.S.C. § 2516(1)(a)-(g). Under the circumstances of this case, these defendants having obtained inventories and access to the evidence, the majority necessarily reasons that the governmental interest must prevail.

If the choice were ours to make, I probably would not quarrel with the majority's conclusions that "there was substantial compliance with the requirements of [Title III]," and, consequently, no requirement of suppression as to Anderson, Baxter, and Sanders due to the failure of the government and the district court to name them in either the wiretap application or the resulting order. The controlling issue of statutory construction, however — an issue with which the majority does not come to grips — has already been decided rather clearly by the Supreme Court. It is in the application of the Court's rule of statutory construction[1] to the facts that I find myself in basic disagreement with the majority.

In United States v. Kahn, 415 U.S. 143, 155, 94 S.Ct. 977, 984, 39 L.Ed.2d 225, 237 (1974), the square holding is as follows:

---

1 The pertinent provisions of 18 U.S.C. § 2518 are:
(1)(b)(iv) — "Each application shall include the following information: . . . the identity of the person, if known, committing the offense and whose communications are to be intercepted. . . ."
(4)(a) — "Each order authorizing or approving the interception of any wire or oral communication shall specify — the identity of the person, if known, whose communications are to be intercepted . . . ."

> We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is "committing the offense" for which the wiretap is sought. Since it is undisputed that the Government had no reason to suspect Minnie Kahn of complicity in the gambling business before the wire interceptions here began, it follows that under the statute she was among the class of persons "as yet unknown" covered by Judge Campbell's order.

Having so held, the Court proceeded to reverse the Seventh Circuit, which had ordered Minnie Kahn's gambling-related telephone conversations suppressed, albeit for reasons more onerous to the government than the test announced by the Supreme Court.

Perhaps apprehensive about its quick dismissal of *Kahn* in this case, the majority somehow divines a contention by the government that probable cause to suspect participation "in the gambling business" existed only as to Doolittle at the time when wiretap authorization was sought. The majority suggests that this absence of probable cause as to the "others as yet unknown" may have resulted from government possession of mere hearsay information, rather than personal observation by investigating agents, concerning the behavior of these "others." Such a dichotomy, if seriously advanced, could indeed effect a major reformulation of the law of probable cause. *See*

Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Draper v. United States, 358 U.S. 307, 311, 79 S.Ct. 329, 332, 3 L.Ed.2d 327, 331 (1959); Gonzales v. Beto, 5th Cir. 1970, 425 F.2d 963, 968-970, cert. denied, 400 U.S. 928, 91 S.Ct. 194, 27 L.Ed.2d 189 (1970). Nor do I understand the majority to suggest that "probable cause" as to a given individual or telephone number connotes a more demanding standard when wiretaps are used by contrast to other types of searches. Again such a suggestion would, in my view, be erroneous. *See* United States v. Falcone, 3rd Cir. 1974, 505 F.2d 478, 481; United States v. Finn, 7th Cir. 1974, 502 F.2d 938, 941. The question with which I shall attempt to deal, then, is whether, at the time when wiretap authorization was sought, the government had probable cause to suspect that Anderson, Baxter, and Sanders were conspiring with or assisting Doolittle in illegal gambling involving the use of the telephone at the Sportsman's Club. For reference, reproduced in the margin[2] are the government's wire-

2 APPLICATION
(Number and Title Omitted)

Charles T. Erion, an Assistant United States Attorney, Middle District of Georgia, being duly sworn states:

This sworn application is submitted in support of an order authorizing the interception of wire communications. This application has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Organized Crime and Racketeering Section, United States Department of Justice, Washington, D. C., together with Agents of the Federal Bureau of Investigation.

1. He is an "investigative or law enforcement officer — of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is — he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated

the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

[516] 3. This application seeks authorization to intercept wire communications of Billy Cecil Doolittle and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code, that is — offenses involving the transmission, by means of an interstate wire facility, of gambling and wagering information by a person engaged in the business of gambling, in violation of Title 18, United States Code, Section 1084, and the use of interstate telephone communication facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), in violation of Section 1952 of Title 18, United States Code, and a conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code, which have been committed and are being committed by Billy Cecil Doolittle and others as yet unknown.

4. He has discussed all the circumstances of the above offenses with Special Agent Gary W. Hart of the Macon, Georgia office of the Federal Bureau of Investigation who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent Hart (attached to this application as Exhibit B and incorporated by reference herein) which alleges the facts therein in order to show that:

(a) there is probable cause to believe that Billy Cecil Doolittle and others as yet unknown have committed and are committing offenses involving the transmission, by means of an interstate wire facility, of gambling and wagering information by a person engaged in the business of gambling, in violation of Title 18, United States Code, Section 1084, and the use of interstate [517] telephone communication facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), in violation of Section 1952 of Title 18, United States Code, and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code.

(b) there is probable cause to believe that particular wire communications of Billy Cecil Doolittle and others as yet unknown concerning these offenses will be obtained through the interception, authorization for which is herewith applied for. In particular, these wire communications will concern the interstate transmission of gambling information relating to the outcome of professional baseball games and the dissemination of such information to persons engaged in the unlawful business of gambling, and the participants in the commission of said offenses.

(c) normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.
(d) there is probable cause to believe that the telephones listed to the Sportsman's Club located in the premises of the Sportsman's Club, 222 Third Street, Macon, Georgia, and carrying telephone numbers 912-746-9110, 912-745-2843, 912-745-2844, and 912-745-2845 have been used and are being used by Billy Cecil Doolittle and others as yet unknown [518] in connection with the commission of the above-described offenses.

5. No previous application has been made to any Judge for authorization to intercept or for approval of interception of wire or oral communications involving any of the same persons, facilities, or places specified herein.

WHEREFORE, your affiant believes that probable cause exists to believe that Billy Cecil Doolittle and others as yet unknown are engaged in the commission of offenses involving the transmission of gambling and wagering information by means of an interstate wire facility, by a person engaged in the business of gambling and the use of interstate telephone communication facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), and a conspiracy to do so; that Billy Cecil Doolittle and others as yet unknown have used, and are using the telephone listed to the Sportsman's Club, located at 222 Third Street, Macon, Georgia, and bearing numbers 912-746-9110, 912-745-2843, 912-745-2844, and 912-745-2845, in connection with the commission of the above-described offenses; that communications of Billy Cecil Doolittle and others as yet unknown concerning these offenses will be intercepted to and from the above-described telephone; and that normal investigative procedures appear unlikely to succeed and are too dangerous to be used.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent Hart, which is attached hereto and made a part hereof, affiant requests this court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation of the United States Department of Justice to intercept wire communications to and from the above-described telephones until [519] communications are intercepted which reveal the manner in which Billy Cecil Doolittle and others as yet unknown participate in the illegal use of interstate telephone facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), and which reveal the identities of his confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of that order, whichever is earlier.

/s/ CHARLES T. ERION
CHARLES T. ERION
Assistant United States
Attorney
Middle District of Georgia

Subscribed and sworn to before
me this 21 day of August, 1970.
/s/ W. A. BOOTLE
UNITED STATES
DISTRICT JUDGE

AFFIDAVIT OF GARY W. HART

Gary W. Hart, Special Agent, Federal Bureau of Investigation, Macon, Georgia, being duly sworn, states:

1. I am an "investigative or law enforcement officer of the United States" within the meaning of Section 2510(7) of Title 18, United States Code — that is, an officer of the United States who is empowered by law to conduct investigations of and to make arrests for offenses enumerated in Section 2516 of Title 18, United States Code.

2. I have conducted an investigation of the offenses of Billy Cecil Doolittle and, as a result of my personal participation in that investigation and of reports made to me by other agents, I am familiar with all the circumstances of the offenses.

3. A confidential informant who has admitted personal participation in gambling activities, has stated that Doolittle operates a bookmaking operation in the Sportsman's Club, located at 222 Third Street, Macon, Georgia. Doolittle is assisted in his bookmaking operation by Will Sanders who is a full partner. Doolittle obtains the "line" for professional baseball games from an unknown individual by placing a call from a pay telephone booth located in the poolroom of the Sportsman's Club at approximately noon each day, and Doolittle and Sanders thereafter disseminate the "line," accept wagers on professional baseball games, and "lay off" bets through use of several telephones, one of which is numbered 745-2844, located in the "members only" room of the Sportsman's Club which is adjacent to the pool room. Among individuals contacted by Doolittle and his associates in this manner are Cliff Anderson of Columbus, Georgia, and Billy Baxter of Augusta, Georgia.

I have established through independent investigation that this informant has had the opportunity to obtain first-hand knowledge of the activities the informant has described. This informant has been contacted by Special Agents of the Federal Bureau of Investigation [521] on several occasions since January 1970 and on four occasions the informant has furnished information which has been determined to be accurate by independent investigation. On a date during the week beginning on August 2, 1970, this informant stated that within five (5) days prior to that date through personal observation of Doolittle's activities in the Sportsman's Club, the informant determined that Doolittle is currently operating as described in the preceding paragraph. This informant further stated that through first-hand knowledge the informant knows that Anderson and Baxter are engaged in accepting wagers on the outcome of professional baseball games as of a date during the week beginning on August 2, 1970.

4. A second confidential informant who has admitted personal participation in gambling activities has also stated that Doolittle operates a bookmaking operation in the Sportsman's Club located at 222 Third Street, Macon, Georgia, in a room off the pool hall area of the building. Further, informant states that during the 1970 professional baseball season, Doolittle, assisted by Will Sanders who is a partner, has utilized telephones, one of which is numbered 745-2844, located in this room to facilitate the placing and acceptance of wagers based upon the outcome of professional baseball games. Doolittle is associated with Cliff Anderson of Columbus, Georgia, and Billy Baxter of Augusta, Georgia, and he participates with these individuals, and others unknown, in the placing and accepting of wagers based upon the outcome of professional baseball games. Doolittle is associated with Cliff Anderson games by placing a call from a pay telephone booth located in the Sportsman's Club at approximately noon each day, and subsequently supplies this line to the aforementioned to assist them in the placing and acceptance of wagers based on the outcome of professional baseball games.

[522] I have established through independent investigation that this informant has had the opportunity to obtain first-hand knowledge of the activities the informant has described. This informant has been contacted by Special Agents of the Federal Bureau of Investigation on several occasions since January 1970 and on 22 occasions the informant has furnished information which has been determined to be accurate by independent investigation. On a date during the week beginning on August 9, 1970, this informant stated that within five (5) days prior to that date, through personal conversation with one of the principals at the Sportsman's Club, the informant determined that Doolittle is currently operating as described in the preceding paragraph. This informant further stated that through first-hand knowledge the informant knows that Anderson and Baxter are engaged in accepting wagers on the outcome of professional baseball games as of a date during the week beginning on August 9, 1970.

* * * * * * * *

6. Examination of the records of the Macon, Georgia, Credit Bureau on April 27, 1970, disclosed that Doolittle and William A. Sanders, Jr., are listed as owners of the Sportsman's Club, Macon, Georgia. Sanders was also listed as a former employee of the Southern Bell Telephone Company for 13 years.

* * * * * * * *

/s/ GARY W. HART
Special Agent
Federal Bureau of
Investigation

Subscribed and sworn before me
this 21 day of August, 1970.
/s/ W. A. BOOTLE
United States District Judge

tap application and supporting affidavit of Special Agent Gary W. Hart, insofar as these materials are illuminative of the question at hand.

Among the features of these materials which convince me that law enforcement officers had probable cause as to Anderson, Baxter, and Sanders are the following: (a) The basis of the application was Hart's affidavit. Repeatedly Hart explicitly refers to a telephone wagering operation conducted over the Sportsman's Club telephone by Doolittle, Anderson, Baxter, and Sanders. (b) Hart avers that these activities were reported to him by confidential informants, alleged upon Hart's oath to have made declarations against penal interest as indicia of reliability, one of whom is further alleged to have given reliable information on twenty-two prior occasions. (c) The information is quite specific with respect to the players, their roles, certain wagered athletic contests, and the physical setting. (d) Hart avers that this specificity is the product of personal knowledge on the part of the informants, whose personal knowledge Hart swears he has verified through "independent investigation." Without belaboring the point, I simply confess my bemusement that if the Hart affidavit did not provide probable cause as to Anderson, Baxter, and Sanders, I do not know what would. *See* Gonzales v. Beto, *supra*, 425 F.2d at 968-969; *see also* Polanco v. Estelle, 5th Cir. 1975, 507 F.2d 81 ("in judging probable cause magistrates are not to be confined by restrictions on their use of common sense"); United States v. James, 9th Cir. 1974, 494 F.2d 1007; United States v. McHale, 7th Cir. 1974, 495 F.2d 15. Yet, for reasons not entirely apparent to this court, the

government saw to it that neither the application nor the order made reference to any of these three defendants.[3]

The government's own statements shed additional light on the issue. When this appeal was briefed, the Supreme Court had not yet decided *Kahn*. At that time the government's position was that the term "person, if known," as used in § 2518(1)(b)(iv) and 4(a), meant only the "subject" of the interception, whom the government contended was Doolittle. Not anticipating that the Supreme Court would choose a middle ground between its argument and the "discoverability" test successfully advanced by Minnie Kahn in the Seventh Circuit, the government stated in its brief to this court:

> The application in the present case demonstrated that agents of the government actually "knew," that is had personal knowledge as opposed to information, of only one defendant who was using the phones in question: defendant Doolittle, the person named in the order. They and the Court had nothing more than "probable cause to believe" that Anderson and Baxter [and Sanders] would be intercepted.[4]

Or, I would add, that these three were "committing the offense" for which the wiretap was sought.

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3 The district court, in drawing the wiretap order, simply adopted the "others as yet unknown" language used by the government in its application.

4 Brief for the government at 28-29.

Thus, the majority manufactures for the government a result which reflects considerable profit from inconsistent positions, while purging the government's contention of any adverse consequences, however logical or proper they may be. Appellant Anderson argues that in this respect the government should now be estopped. There may be merit to Anderson's argument, inasmuch as the government was equally as capable as appellants to anticipate what the Supreme Court would hold in *Kahn*. I need not rest my views on estoppel, however, since I have already concluded that the requisite probable cause existed as to Anderson, Baxter, and Sanders at the time when tap authorization was sought. Under *Kahn*, therefore, I would reverse as to these three with directions to the district court to suppress their intercepted communications pursuant to 18 U.S.C. § 2518(10)(a)(ii) ("order of authorization or approval under which it was intercepted is insufficient on its face").[5]

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5 Although the majority does not make this argument in support of its conclusion that Title III was substantially complied with, one might contend that paragraph 4 of the wiretap application, which purports to incorporate the Hart affidavit by reference, operated in legal usage to name Anderson, Baxter, and Sanders insofar as § 2518(1)(b)(iv) required that they be named in the application. One might then argue that since neither the application, the supporting affidavit, nor the order in *Kahn* mentioned Minnie Kahn, and that since the Supreme Court phrased its holding disjunctively in terms of naming a person in the application *or* interception order, the Court implied thereby that the naming of probable cause suspects in *either* the application or the order would satisfy the statute. I may assume that the incorporation by reference operated to name Anderson, Baxter, and Sanders in the application, but I reject the idea that *Kahn* supports or implies the rest of the argument. First, the significant feature of *Kahn* is its emphasis on the literal language and terms of Title III. In addition to requiring, under *Kahn*, the naming of probable cause suspects in the application, Title III literally requires that they also be named in the order. § 2518(4)(a). That was not done in this case, and

Kahn — inasmuch as it involved no question of half-compliance, through incorporation by reference or otherwise — cannot be deemed to support an analysis which runs counter to the statute's literal provisions. Second, although *Kahn* holds that the district court's duty to include names in the order is no broader than the government's duty to include them in the application, the Court explicitly recognized that "[s]ection 2518(4)(a) requires that the order specify 'the identity of the person, if known, whose communications are to be intercepted.' " 415 U.S. at 151, 94 S.Ct. at 982, 39 L.Ed.2d at 234. This part of the Court's discussion does strongly imply a responsibility on the government to see that the names of its probable cause suspects are placed in the court's order — the operative document for initiating a lawful wiretap — as well as the application. This responsibility arises because "the judge who prepares the order can only be expected to learn of the target individual's identity through reference to the original application . . . ." *Id.*

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

versus

Billy Cecil DOOLITTLE, William Augustus Sanders, Jr., Ernest Massod Union, Julian Wells Whited, Frank Joseph Masterana, Cliff Anderson, Darnice T. Malloway, and William E. Baxter,
Defendants-Appellants.

No. 72-3263.

United States Court of Appeals,
Fifth Circuit.

Sept. 2, 1975

Appeals from the United States District Court for the Middle District of Georgia, William A. Bootle, Judge, 341 F.Supp. 163.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, CLARK, RONEY and GEE, Circuit Judges.*

PER CURIAM:

The Court voted to reconsider this case *en banc* primarily to determine the correctness of the issue on

* Circuit Judge Morgan did not participate in the decision of this case.

which the panel divided: whether the failure to name defendants Anderson, Baxter and Sanders in the wiretap interception order required suppression in their trials of intercepted telephone conversations to which they were parties. A majority of the en banc court agrees with the panel's resolution of the issue and the convictions of Anderson, Baxter and Sanders are affirmed on the basis of the panel opinion. *United States v. Doolittle*, 507 F.2d 1368 (5th Cir. 1975). Having considered all issues in the case, the Court agrees that the panel correctly decided the issues on which the panel was itself unanimous.

Affirmed.

BROWN, Chief Judge, and WISDOM, THORNBERRY, GOLDBERG and SIMPSON, Circuit Judges, dissent from the affirmance of the convictions of Anderson, Baxter and Sanders, and would reverse for the reasons stated in Judge Thornberry's dissent to the panel decision. 507 F.2d at 1372. *Cf. United States v. Bernstein*, 509 F.2d 996 (4th Cir. 1975), *petition for cert. filed*, 43 U.S. L.W. 3637 (U.S. May 27, 1975) (No. 74-1486).

GODBOLD, Circuit Judge (dissenting):

The problem presented is whom must the government name in its applications for wiretap orders under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. The pertinent section requires the government to state in its application for a wiretap order "the identity of the person, if known, committing the offense and whose communications are to be intercepted . . . ," § 2518(1)(b)(iv). The court

order must state "the identity of the person, if known, whose communications are to be intercepted . . . ," § 2518(4)(a).[1] Defendants contend that the government must name every person who it has probable cause to believe is committing the crime being investigated. The Fourth and Sixth Circuits have adopted that view. *United States v. Bernstein*, 509 F.2d 996 (CA4, 1975); *United States v. Donovan*, 513 F.2d 337 (CA6, 1975). The government contends, in effect, that so long as it gives the name of one person with respect to whom it has probable cause it need not reveal the names of others with respect to whom probable cause is also present.

Neither approach to the government's obligation is workable. The defendants' view is too expansive. A single wiretap may produce dozens if not hundreds of names of individuals not seriously under investigation but with respect to whom the existence of probable cause might be found. The probable cause approach would stifle if not smother the law enforcement efforts of government agencies with administrative labors. I think Congress did not intend such a result.

The government's view is too narrow. Congress did not intend to permit the government to name whomever it chooses and no others. The thrust of the wiretap statute is judicial supervision of necessary executive invasions of privacy. Such supervision can only serve its function where the supervising court has sufficient access to the information needed for due

1 The insignificance of the discrepancy between the language relating to wiretap applications and that relating to wiretap orders is discussed in *United States v. Kahn*, 415 U.S. 143, 152, 94 S.Ct. 977, 982, 39 L.Ed.2d 225, 235 (1974).

consideration of wiretap applications. In these *ex parte* proceedings the government is the only source of information. An interpretation that requires the government agency to name only one person when it is actively directing the interception against many more persons reads the naming requirement out of the Act and shifts the locus of informed decision-making from the courts to the agencies. This is contrary to the intent of Congress.

The majority panel decision, adopted by the en banc majority, does not decide whether there was or was not probable cause with respect to Anderson, Baxter and Sanders. Judge Thornberry pointed out in his dissent to the panel opinion that it did not come to grips with this question. Rather, the panel opinion appears to say that, even if there was probable cause with respect to these defendants, the governmental action is nonetheless salvaged by an amalgam of substantial compliance with the statute, no prejudice to the defendants, and no bad faith or subterfuge by the government. I have great difficulty with this cure by analgesic balm. The statutory scheme recognizes the privacy interest of one using telephone communications and makes wiretapping a felony except for statutorily prescribed exceptions, 18 U.S.C. § 2511(1). I think none of these grounds is adequate to overcome the policies inhering in the congressional determination to prohibit and severely punish unauthorized wiretapping, §§ 2511(1) and 2520.

Construing after-the-fact performance of the requirement of § 2518(8)(d) as substantial compliance misses the thrust of the statute, which is not dis-

closure to the victim after the fact but review by a federal district judge before the fact. What is missing from the government's proffered compliance is the federal district judge's review of the wiretap plans to protect the privacy interest of the unnamed persons. This is the heart of the statutory scheme. When the person is not named the further disclosure requirements of § 2518(1)(e) are also not triggered and judicial supervision becomes a charade.[2]

Even if that right is discounted, reliance upon after-the-fact compliance with the requirements of § 2518(8)(d) as substantial compliance with the statutory scheme renders the application and order requirements nugatory. If the government need not name a suspect so long as he is given after-the-fact notice and transcripts, then the government need never disclose names in the original application, for it could always give retrospective validity to its actions by sending notice and transcript to whomever it later chooses to prosecute. Without names the courts will be seriously disabled in their function of reviewing the applications for probable cause and considering other relevant factors under § 2518(3). The limiting and deterrent features of the statute would be lost. Congress surely did not intend to allow this.

Except to the extent, if at all, that there may be substantial rather than literal compliance with the statute, the statutory scheme does not allow a "no preju-

2 No court is empowered to consider after the fact whether the wiretap was proper in terms of balancing the conflicting interests of privacy and law enforcement, as the application court is empowered to do under § 2518(4), discussed *infra*. Thus the necessity for proper and informed decision on that question before the fact looms larger in significance.

dice" or "error without injury" approach. The statute recognizes the right of privacy of one using telephone communications and makes wiretapping a felony except for statutorily prescribed exceptions, 18 U.S.C. §§ 2511(1)(a) and (b) and 2518. One whose privacy has been invaded by an action felonious if not excepted by statute may not be denied suppression on the ground that he really has not been hurt very much.

With respect to good faith, a governmental pure heart does not validate an otherwise invalid wiretap any more than it would a private person's erroneous but good faith belief in the legality of his wiretap of a neighbor or competitor. Even if the government is to be given greater deference, I have difficulty understanding what constitutes good faith in this context.[3] It is obvious that if the government is not required to name a person with respect to whom it has probable cause, then it does not act in bad faith in not naming him. As employed by the majority the phrase "good faith," amorphous and undefined, is not a tool of analysis but merely a palliative. It has no relevance to whether the function of the statute — judicial supervision of executive invasions of individual privacy — has been served.

Since I reject the arguments by which the majority

3 This is wholly different from the good faith referred to in § 2520, which goes to reliance on a district judge's order, a specific and well-defined concept of good faith unlike that offered by the majority here. Moreover, the good faith there protects government employees from severe after-the-fact sanctions for human errors to which their work particularly exposes them; here it is being used to undercut the before-the-fact protections sought to be provided by the statute. Taken together they empower the very abuses, under color of law and protected from punishment, which this act was designed to prevent.

resolve this case, I must consider the question of what triggers the naming requirement of § 2518(1)(b)(iv). Originally I thought that I would join my fellow dissenters, who have taken a stand on *United States v. Kahn*, 415 U.S. at 155, 94 S.Ct. at 984, 39 L.Ed.2d at 237, and *United States v. Bernstein*, 509 F.2d at 1001 — 1002.[3a] See the dissent from the panel opinion, 507 F.2d 1368, 1372, 1373, adopted by the en banc minority. On further reflection I have concluded that I cannot join them in that position. At the most *Kahn* only says that if the government does not have probable cause to believe a person is committing the crime being investigated then the government need not name that person under § 2518(1)(b)(iv),[4] 415 U.S. at 155, 94 S.Ct. at 984, 39 L.Ed.2d at 237. I do not read this to decide the converse proposition that if the government does have probable cause it must name the person. We must then look to the statute to determine whether Congress indicated more definitely whom it wanted named in wiretap applications.

Steering between the Scylla of a stifling administrative burden and the Charybdis of unchecked executive power, I would require the government to name all those individuals "against whom the interception was directed," as that phrase is used in the definition of aggrieved person in § 2510(11).[5] This definition is keyed to the standing and substantive rights

3a *See also United States v. Donovan*, 513 F.2d at 341.

4 I think that § 2518(3) poses a distinct naming requirement, *see infra*.

5 The important details of who must carry exactly what burden of proof must be left to the district courts to work out through practical experience.

given in § 2518(10)(a) and reflecting a congressional concern for protecting the interests of those subjected to government investigations.

I do not see how the naming requirement can be any narrower.[6] As I have already pointed out, to permit the government to conduct an investigation by wiretapping without ever disclosing to a court the persons it hopes to hear and ultimately convict makes mincemeat of the statutory system. This could subject to intentional, repeated, unsupervised and unpunishable[7] invasions of privacy any person who talks by telephone with persons — only one per wiretap would be necessary under the majority's approach — against whom the government is able to make some showing of probable cause. The essence of the § 2518(1)(e) requirement of disclosure to the application court of prior wiretaps is to prevent such activity. It cannot be prevented unless the government is required to apprise that court of the identity of the persons at whom investigation and wiretap are directed.[8]

If one is to move toward a broader reading of the naming requirement, I see no stopping point short of probable cause. For the reasons noted above I think

6 Whatever bearing some of the language in *Kahn* may have on this point, I think it is sufficient to say that the individual in that case whose conversation was overheard was not under investigation and that the government made a convincing showing to that effect.

7 By reason of § 2520.

8 The target-naming requirement would cut off more severe abuses, by judicial supervision where the persons are named, and by the sanctions of §§ 2511(1) and 2520 where they are not named. The good faith defense provided in § 2520 would be unavailable where the naming requirement is clear and the failure to name is egregious, notwithstanding the presence of a § 2518(3) order.

such a requirement would be too broad because of the administrative burdens it would place on law enforcement agencies.

The approach which I have taken meshes neatly with the application-and-order procedure under which all wiretaps are to be conducted. The statute posits that courts should supervise law enforcement agencies' wiretap activities. Wiretaps are of course a powerful investigative tool, but the concomitant invasions of privacy necessarily occurring must be weighed against the investigative convenience. The ultimate decision-maker is the federal district court. Judicial supervision of wiretapping begins when a law enforcement agency applies to a court for a wiretap order. Section 2518(1) requires the application to disclose authorization for the application under §§ 2516(1) or (2), the phone to be tapped, the crime believed to be committed, the name of the suspect, a statement that other investigative means have been exhausted or would not be productive, and prior wiretaps of the persons named. The next subsection authorizes the judge to "require the applicant to furnish additional testimony or documentary evidence in support of the application," § 2518(2). The judge who must weigh the competing values of privacy and efficient law enforcement is thus empowered to obtain information pertinent to those factors from the only party before it in these *ex parte* proceedings. The separate authorization of § 2518(2) would be redundant and superfluous if it reached no more than is already covered by § 2518(1)(b), since the judge could always refuse to issue an order until the law enforcement agency had satisfactorily complied with that subsection.

Section 2518(2) is an invitation to the judge receiving the application to plumb the scope and purpose of the government's investigation. It authorizes him to inquire into whatever other purposes the government agency might have, into possible and suspected wrongdoers not yet the subject of probable cause beliefs, and into other collateral matters which, although not required by the bare application requirements of § 2518(1)(b), the court might consider in deciding whether to grant the order.

The judge's duty to weigh these collateral and competing factors is contained in the next subsection, § 2518(3), which does not require, but only authorizes, issuance of a wiretap order after the appropriate findings of probable cause — "the judge *may* enter an ex parte order . . . if the judge determines on the basis of the facts submitted by the applicant that . . . there is probable cause for belief that an individual is committing . . . a particular offense" and that a wiretap will disclose pertinent communications, along with other necessary findings (emphasis added).[9] The judge has discretion not to issue a wiretap order even if he is satisfied that a showing of probable cause has been made. The authorization to require additional information in § 2518(2) read in conjunction with this discretion suggests a broad grant of power to the courts to oversee governmental wiretapping.

In the instant case, I would remand to the District Court for a hearing on whether Anderson, Baxter and

9 Compare § 2518(10)(a), which refers to a presumption of illegality "if the motion [to suppress] is granted . . ." The conditional "if" here could go to a finding of grounds for suppression, as well as to judicial discretion. But there is no such ambiguity in § 2518(3), which must include discretion.

Sanders were targets of the government's investigation when the relevant wiretap application was made, that is, whether the wiretaps were directed against them, taking due account of whether the government can reasonably be believed not to be investigating these persons in light of the information it had already collected against them.

APPENDIX C

UNITED STATES of America,
Plaintiff-Appellee,

versus

Billy Cecil DOOLITTLE, William Augustus Sanders, Jr., Ernest Massod Union, Julian Wells Whited, Frank Joseph Masterana, Cliff Anderson, Darnice T. Malloway, and William E. Baxter,
Defendants-Appellants.

No. 72-3263.

United States Court of Appeals,
Fifth Circuit.

April 7, 1975.

Appeal from the United States District Court for the Middle District of Georgia, William A. Bootle, Judge, 341 F.Supp. 163.

ON PETITIONS FOR REHEARING
AND PETITIONS FOR REHEARING EN BANC

(Opinion February 14, 1975, 5 Cir., 1975, 507 F.2d 1368).

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the applications for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

It is ordered that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 72-3263

D. C. Docket No. CR 8815

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

BILLY CECIL DOOLITTLE, WILLIAM AUGUSTUS SANDERS, JR., ERNEST MASSOD UNION, JULIAN WELLS WHITED, FRANK JOSEPH MASTERANA, CLIFF ANDERSON, DARNICE T. MALLOWAY, and WILLIAM E. BAXTER,
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Georgia

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Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, CLARK, RONEY and GEE, Circuit Judges.*

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* Circuit Judge Morgan did not participate in the decision of this case.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on defendants-appellants' petitions for rehearing en banc and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed by the Court en banc.

September 2, 1975

BROWN, Chief Judge, and WISDOM, THORNBERRY, GOLDBERG and SIMPSON, Circuit Judges, dissent from the affirmance of the convictions of Anderson, Baxter and Sanders.

GODBOLD, Circuit Judge, dissenting.

ISSUED AS MANDATE:

Nos. 75-500, 75-509, and 75-513

In the Supreme Court of the United States

OCTOBER TERM, 1975

CLIFF ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

DARNICE T. MALLOWAY, PETITIONER

v.

UNITED STATES OF AMERICA

BILLY CECIL DOOLITTLE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

Cases:

Cases—Continued

Constitution and statutes:

Constitution and statutes—Continued

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-500

CLIFF ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-509

DARNICE T. MALLOWAY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-513

BILLY CECIL DOOLITTLE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the panel of the court of appeals (Pet. No. 75-500 App. A) is reported at 507 F.2d 1368. The opinion of the court of appeals *en banc* (Pet. No. 75-500 App. B) is reported at 518 F.2d 500.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on September 2, 1975. The petitions for a writ of certiorari were filed on October 1 and October 2, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the application for an order authorizing telephone interception sufficiently identified those whose communications were to be intercepted, and, if not, whether evidence obtained pursuant to the order should be suppressed.

2. Whether the application for the order authorizing the interception sufficiently established that other investigative procedures were inadequate. (This issue is raised only by petitioners Doolittle, Sanders, Union and Whited.)

STATEMENT

After a non-jury trial in the United States District Court for the Middle District of Georgia, each petitioner was convicted of conspiring, in violation of 18 U.S.C. 371, to violate 18 U.S.C. 1084 and 1952 by using interstate telephone facilities to carry on an

illegal gambling operation; each petitioner also was convicted of substantive violations of 18 U.S.C. 1952; and petitioner Doolittle was convicted of substantive violations of 18 U.S.C. 1084.[1] A panel of the court of appeals affirmed, with one judge dissenting from the convictions of Anderson, Baxter and Sanders on the ground that failure to name them in the intercept application and order required suppression as to them of the evidence derived from the interceptions (Pet. No. 75-500 App. A). The court of appeals *en banc* affirmed on the basis of the panel opinion, six judges dissenting on the interpretation of the naming requirement (Pet. No. 75-500 App. B).

The undisputed facts are set forth in the district court's special findings (C.A. App. 323-330). Briefly, Doolittle and Sanders were partners in the ownership and operation of the Sportsman's Club in Macon, Georgia, and in the illegal gambling business con-

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[1] Petitioners received the following sentences: Doolittle, one year and one day's imprisonment to be followed by 5 years' probation; Malloway, 9 months' imprisonment to be followed by 5 years' probation; Sanders and Anderson, 6 months' imprisonment to be followed by 5 years' probation; Union and Whited, 5 years' probation.

Co-defendant Frank Joseph Masterana was convicted of conspiracy and substantive violations of 18 U.S.C. 1084 and 1952 and was sentenced to 2 years' imprisonment to be followed by 5 years' probation; co-defendant William E. Baxter was convicted of conspiracy and substantive violations of 18 U.S.C. 1952, and was sentenced to 6 months' imprisonment to be followed by 5 years' probation. The court of appeals affirmed both convictions; Masterana has not filed a petition for a writ of certiorari; on December 2, 1975, Baxter's petition was dismissed pursuant to Rule 60 of the Rules of this Court.

ducted over telephones in the club. Whited and Union were employees of the club who assisted in operating the gambling business. Masterana, who was located in Nevada, supplied line information by telephone to Doolittle, Sanders, Union, and Whited, who transmitted it by intrastate telephone to Malloway, Baxter and Anderson, for use in conducting other illegal gambling businesses.

The evidence was derived from a wire interception authorized on August 21, 1970, by the Chief Judge of the United States District Court for the Middle District of Georgia (C.A. App. 140-144), on the basis of an application made by an Assistant United States Attorney on the same date (C.A. App. 112-117). Both the order and the application specifically identified petitioner Doolittle and "others as yet unknown" as the persons whose communications were to be intercepted.[2]

ARGUMENT

1. Petitioners contend that evidence derived from the wire interception should have been suppressed because the intercept application and order did not name Sanders, Baxter or Anderson although the government had probable cause to believe that their con-

[2] The order authorized interception over four telephones located in the Sportsman's Club: three were interconnected as a rotary combination, and the other was a pay telephone in a booth (C.A. App. 131). Interception over the pay telephone was limited to times when Doolittle was observed to be inside the club and could be continued only when it was determined by voice recognition that Doolittle himself was using the pay telephone (C.A. App. 142-143).

versations would be overheard. They rely upon 18 U.S.C. 2518(1)(b)(iv), which provides that the application should include "the identity of the person, if known, committing the offense and whose communications are to be intercepted." [3]

a. Only Sanders and Anderson have standing to seek suppression on this basis. Doolittle was identified in both the application and order, and Union, Whited, and Malloway do not claim that they should have been identified in the application or the order. These four petitioners claim only that they are entitled to suppression because of an alleged defect in the application and order relating solely to three other persons. They are thus attempting to assert the rights of others as a basis for suppression of evidence obtained without violation of their own rights. But "standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search." *United States* v. *Calandra*, 414 U.S. 338, 348; see *Brown* v. *United States*, 411 U.S. 223, 229-230. The traditional standing rules were incorporated into the suppression sections of the wire interception statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968. S. Rep. No. 1097, 90th Cong., 2d Sess., pp. 91, 106 (1968);

[3] Similarly, 18 U.S.C. 2518(4)(a) requires the order to specify "the identity of the person, if known, whose communications are to be intercepted." This language imposes no broader requirement than the identification provisions of 18 U.S.C. 2518(1)(b)(iv). *United States* v. *Kahn*, 415 U.S. 143, 152.

Alderman v. *United States*, 394 U.S. 165, 171-172, 175 n. 9; *United States* v. *Scasino*, 513 F.2d 47 (C.A. 5); *United States* v. *Gibson*, 500 F.2d 854 (C.A. 4), certiorari denied, 419 U.S. 1106. Accordingly, since petitioners Doolittle, Union, Whited and Malloway cannot claim that the omission of an identification of Sanders, Baxter and Anderson violated any rights of theirs, they have no standing to complain of the failure to identify.[4]

b. The question whether Section 2518(1)(b)(iv) requires the government to identify in the application for the intercept order all those who it has probable cause to believe will be overheard using the telephone in the commission of the described offenses is raised by the government's petitions for writs of certiorari

[4] The decision in *United States* v. *Bellosi*, 501 F. 2d 833 (C.A. D.C.), is not inconsistent with this conclusion. There, the court found that the failure to inform the authorizing judge that the conversations of one of the targets of the proposed interception had previously been intercepted rendered the entire subsequent interception illegal, since that information might have led to the denial of the authorization for the subsequent interception (*id.* at 838-839). Accordingly, the court concluded that the subsequent communications were "unlawfully intercepted" and subject to suppression on the motion of any "aggrieved person" under 18 U.S.C. 2518(10)(a), including any persons who were parties to the improperly intercepted conversations or against whom the interception was directed, 18 U.S.C. 2510(11). But see *United States* v. *Kilgore*, 524 F.2d 957, 958, n. 1 (C.A. 5). In contrast, here any failure to identify others in the application who might be overheard, when the main target was named, could scarcely have led to the denial of the intercept order and thus did not constitute a significant violation of any mandatory requirement of the Act of the kind involved in *Bellosi*.

in *United States* v. *Bernstein*, No. 74-1486, and *United States* v. *Donovan*, No. 75-212.[5] In those petitions, we argue that the person who must be identified if known is the individual who leases or commonly uses the telephone being monitored, that is, the primary target of the interception. See *Bynum* v. *United States*, No. 74-1445, certiorari denied November 11, 1975, slip op. 1 (dissent from denial of certiorari).

Under that rationale, it was proper in this application and order to identify only Doolittle as the person whose communications were to be intercepted. He was the prime target who was known to be committing the substantive offenses under investigation by means of the telephone to be intercepted (C.A. App. 119-120, 124, 130; R. 522). Although Baxter and Anderson were persons with whom Doolittle could be expected to discuss his illegal activities on the intercepted telephone, that fact does not require that they be named in the application and order. They are precisely similar to the persons who were not named in the applications for the interceptions in *Bernstein* and *Donovan*, who also might have been expected to engage in conversations with the named target over the intercepted telephone.

The situation of Sanders is somewhat different; he was Doolittle's partner in the gambling business and therefore was an alternate user of the intercepted telephones. His situation was thus somewhat closer

[5] We are sending petitioners a copy of our petitions in *Bernstein* and *Donovan*.

to that of Mrs. Kahn, the alternate user of the intercepted telephone in *United States* v. *Kahn*, 415 U.S. 143. But there was no need to name him in the application because he was in no sense a primary target of the investigation. Indeed, he was not known to have been committing the substantive offense (see Section 2518(1)(b)(iv)), since he was not known to have made any interstate telephone calls; he was charged only with conspiracy with the prime target, Doolittle.

c. In any event, Sanders, Baxter and Anderson were all identified in the affidavit supporting the application, which was incorporated by reference into the application itself (C.A. App. 113, 119-137). The affidavit of FBI Agent Gary W. Hart named them, and it clearly set out the information the government possessed regarding their participation in the offenses being investigated; it thus informed the district judge of the strong probability that these persons would be overheard during the intercept (C.A. App. 119-122, 123, 131-135). Therefore, by incorporating the information contained in the affidavit, the application satisfied the reading of Section 2518(1)(b)(iv) urged by petitioners and adopted by the courts of appeals in *Bernstein* and *Donovan*. Cf. *United States* v. *Manfredi*, 488 F.2d 588, 598 (C.A. 2), certiorari denied, 417 U.S. 936.[6]

[6] In *Bernstein* (Pet. No. 74-1486, pp. 15-17), we argue that the congressional policies discussed by the court of appeals in that case are not directly or substantially promoted by the identification in the application of persons other than the principal target of the interception. However, assuming *arguendo* that the court of appeals in *Bernstein* was correct, these purposes were satisfied in this case. In reviewing the intercept papers prior to authorizing the application, the Attorney General was made aware by the affidavit of the evidence implicating Sanders, Anderson, and Baxter (C.A. App. 194-196, 196-197); the issuing judge was informed that there had been no previous electronic surveillance of these three suspects (or of Doolittle) (C.A. App. 115, 137); and all defendants, including these three, received inventory notices of the interception (Pet. No. 75-500, App. A 5a).

Neither Bernstein nor Donovan was named in the affidavits submitted to the court in support of the applications at issue in their cases. The other two individuals involved in the *Donovan* case were simply mentioned in passing in the affidavits.

d. For the foregoing reasons and those contained in our *Bernstein* and *Donovan* petitions, we submit that the court below incorrectly assumed that the application failed to comply with the requirements of 18 U.S.C. 2518(1)(b)(iv).[7] But we also submit that

[7] We recognize that, although under this analysis the application named the others involved in the illegal activities, the order did not, and thus the order technically failed to comply with 18 U.S.C. 2518(4)(a) if the naming of these individuals was required by the statute. But where person are identified in the application, the omission of their names from the order is not a defect justifying suppression, since no congressional policies have been defeated by the omission and the defendants have not been prejudiced thereby. Cf. *United States* v. *Cirillo*, 499 F. 2d 872, 878-880 (C.A. 2), certiorari denied, 419 U.S. 1056. Therefore, the omission of the identities of Sanders, Baxter and Anderson from the intercept order, where they were set out in the application incorporating the affidavit, is not the violation of a statutory requirement which would render the interception unlawful, and hence suppressible, under 18 U.S.C. 2518(10)(a)(ii). *United States* v. *Giordano*, 416 U.S. 505, 527; *United States* v. *Chavez*, 416 U.S. 562, 575-

it was correct in holding that, if there was such a failure, it did not warrant suppression (see our *Bernstein* petition, pp. 12-17).

Nevertheless, since the issue whether the failure to identify a known person in an intercept order is grounds for suppression is before this Court in the government's pending petitions in *Bernstein* and *Donovan*, this Court may wish to hold No. 75-500 (Anderson's petition) and No. 75-513 (with respect to petitioner Sanders only) until it has acted on those petitions. If the Court concludes in those cases that a failure to name a known person warrants suppression of his intercepted conversations, Anderson's and Sanders' claims should be remanded to the court of appeals to determine whether there was such a failure as to them.[8]

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580. Nor would suppression be required under traditional doctrine, since no constitutional rights were violated. The Fourth Amendment does not require that a warrant name the person whose "things [are] to be seized." *Berger* v. *New York*, 388 U.S. 41, 58-59. The things to be seized in this case were, of course, gambling conversations, which were particularly described in the order (C.A. App. 140-142).

[8] We suggested in our *Donovan* petition that *Donovan* was a more suitable vehicle for plenary review by this Court than *Bernstein* (*Donovan* petition, pp. 18-19). We continue to be of that view. We also suggest that *Donovan* is more suitable for plenary review than the instant case, in which the court of appeals assumed, but did not decide, that Sanders and Anderson should have been named. In contrast, the court in *Donovan* considered the serious practical question of who must be identified in an intercept application and order, and thus that case provides a better basis for consideration of that question by this Court. This is reinforced by the point, discussed above, that Anderson and Sanders were effectively "identified" by the affidavit and its incorporation by reference in the application, thus making it unnecessary, in our view, to reach the question of identification in their case.

2. Petitioners Doolittle, Sanders, Union, and Whited contend that the monitored conversations should have been suppressed because the intercept application failed to establish sufficiently the inadequacy of other investigative procedures.

18 U.S.C. 2518(1)(c) requires that each application for an order authorizing the interception of wire or oral communications shall include, *inter alia*—

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous; * * *.

Similarly, a finding by the issuing judge that alternative investigative procedures are inadequate is a prerequisite for the issuance of an order authorizing electronic surveillance. 18 U.S.C. 2518(3)(c).

The issuing court's finding that "normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used" (C.A. App. 141) was based upon substantial information in the affidavit supporting the application. The three informants upon whose information the affidavit was based stated that they would not be willing to testify in court (C.A. App. 136), and the affidavit made it plain that the information they had provided was not sufficient to prove any particular act of obtaining

line information from Nevada or of dissemination of the line to other bookmakers. The affiant stated that past experience had shown that searches of gamblers and gambling establishments did not suffice to prove the elements of federal offenses being committed (C.A. 136); this statement was corroborated as to Doolittle himself by the information that a prior search of the Sportsman's Club by local police officers had resulted only in a $500 fine for a local offense (C.A. App. 130-131). The affiant explained that additional physical surveillance would not be helpful because an attendant was always on duty at the club, thereby preventing closer surveillance by sight or by overhearing (C.A. App. 135). The affidavit also set out the results of extensive study of telephone records (C.A. App. 126-128, 134); additional use of this investigation technique would not have established the offenses, because telephone records do not reveal the contents of the conversations.

The information in the affidavit sufficiently established the need for electronic surveillance to satisfy the requirement of Section 2518(1)(c). That section "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153, n. 12. "Congress * * * did not attempt to require 'specific' or 'all possible' investigative techniques before orders for wire taps could be issued. * * * '[T]he statute does not require the government to use a wire tap only as a last resort.'" *United States* v. *Smith*, 519 F.2d 516,

518 (C.A. 9); *United States* v. *Karrigan*, 514 F.2d 35 (C.A. 9), certiorari denied, November 3, 1975, No. 74-1629.[9]

Pertinent decisions have stated, with only minor variation in particulars, the test to be employed in evaluating the nature of the showing required by 18 U.S.C. 2518(1)(c).[10] These decisions teach, in

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[9] Sections 2518(1)(c) and 2518(3)(c) were part of the safeguards included in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, to ensure that the statutory authority to conduct eletronic surveillance embodied therein would "be used with restraint and only where the circumstances warrant" such an investigative device. *United States* v. *Giordano*, 416 U.S. 505, 515. Electronic surveillance was "not to be routinely employed as the initial step in criminal investigation" (*ibid.*). On the other hand, the provisions of 18 U.S.C. 2518(1)(c) were obviously not intended to frustrate the use of wire interception as a valid investigative tool by requiring an unreasonably stringent showing of need:

> Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. [Citations omitted.] What the provision envisions is that the showing be tested in a practical and commonsense fashion.

S. Rep. No. 1097, 90th Cong., 2d Sess., p. 101 (1968).

[10] *E.g.*, *United States* v. *Armocida*, 515 F.2d 29, 37-38 (C.A. 3), certiorari denied *sub nom. Conti* v. *United States*, October 6, 1975, No. 74-6683; *In re Dunn*, 507 F.2d 195, 197 (C.A. 1); *United States* v. *Robertson*, 504 F.2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913; *United States* v. *Brick*, 502 F.2d 219, 224 (C.A. 8); *United States* v. *James*, 494 F.2d 1007 (C.A.D.C.), certiorari denied *sub nom. Jackson* v. *United States*, 419 U.S. 1020; *United States* v. *Pacheco*, 489 F.2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909; *United States* v. *Curreri*, 388 F. Supp. 607, 618-622 (D. Md.), and cases cited therein.

sum, that the requirement of Section 2518(1)(c) is satisfied when—viewing the affidavit in a practical and commonsense fashion—a sufficient factual basis is shown from which the issuing authority can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the criminal activities under investigation, or is necessary to ascertain the full scope of such criminal activities and the identity of the participants therein. See *United States* v. *Turner*, C.A. 9, No. 73-2740, decided July 24, 1975, slip op. 7-8. In making this determination, the issuing judge must consider the type of illegal activity under investigation and the extent to which telephonic communications are involved therein. *United States* v. *Bobo*, 477 F.2d 974 (C.A. 4). He should also weigh the opinions and conclusions of experienced investigators in determining whether to authorize the wire interception. *In re Dunn*, 507 F.2d 195, 197 (C.A. 1). Accordingly, considerable discretion rests with the issuing judge in determining whether the interception is necessary (*United States* v. *Smith*, *supra*, 519 F.2d at 518),[11] and his determination should be accorded substantial weight by the reviewing court (cf. *Jones* v. *United States*, 362 U.S. 257, 270-271).

The affidavit here satisfied the showing required by Section 2518(1)(c) as consistently interpreted by

[11] The issuing judge is, of course, free to request additional information regarding the feasibility of alternative investigative techniques if he is not satisfied with the showing made in the application. See 18 U.S.C. 2518(2).

this Court and the great majority of lower courts that have considered this issue. But petitioners contend (Pet. No. 75-513, p. 11) that the affidavit was inadequate because it failed to satisfy the standard set forth by a panel of the Ninth Circuit in *United States* v. *Kalustian*, No. 74-3314, decided August 4, 1975.[12] The text of the *Kalustian* opinion (reproduced at Pet. No. 75-513 App. E) was, however, significantly modified by the panel on December 11, 1975 (the opinion as revised is set forth in the Appendix, *infra*), presumably in response to the government's petition for rehearing and suggestion of rehearing *en banc* from the original panel decision in *Kalustian*. The amended version omits the overly stringent standard for assessing compliance with 18 U.S.C. 2518(1)(c) that was contained in the original opinion (Pet. No. 75-513 App. E 8e). Nevertheless, in finding the particular affidavit at issue there inadequate, the *Kalustian* panel still appears to have imposed significantly more stringent requirements for the showing

[12] We point out initially that the application here informed the issuing judge that the offenses being investigated were violations of 18 U.S.C. 1084, prohibiting the transmission by means of an interstate wire facility of gambling information, and 18 U.S.C. 1952, prohibiting the use of interstate telephone facilities for the transmission of betting information in aid of a racketeering enterprise (C.A. App. 113). Since the very nature of such crimes tends to make investigative techniques other than interception of the conversations themselves unlikely to succeed, it may be that Section 2518(1)(c) does not require as extensive an independent showing of the inadequacy of other techniques as is necessary when different offenses are involved, such as the violations of 18 U.S.C. 1955 at issue in *Kalustian*.

under Section 2518(1)(c) than Congress intended, or than have previously been required by any of the courts that have interpreted that provision (see note 10, *supra*).[13] We have, accordingly, not withdrawn our petition for rehearing *en banc*, which presently remains pending in the court of appeals.

In cases decided before the original panel decision in *Kalustian*, other panels of the Ninth Circuit have not imposed requirements as stringent as those used in *Kalustian*.[14] We are aware of two other cases presently pending before the Ninth Circuit involving the same issue.[15] In view of these cases, and of our petition for rehearing *en banc* in *Kalustian*, there is a reasonable likelihood that the Ninth Circuit will further clarify its position on the interpretation of Section 2518(1)(c). We therefore suggest that this issue is not now ripe for review by this Court, since the Ninth Circuit has not yet indicated whether *Kalustian* accurately represents its views on the subject.

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[13] The court below did not address the question in this case, but the Fifth Circuit has previously interpreted Section 2518 (1)(c) in accord with the cases other than *Kalustian*. See *United States* v. *Robertson, supra; United States* v. *Pacheco, supra.*

[14] See *United States* v. *Karrigan, supra; United States* v. *Smith, supra; United States* v. *Turner, supra.*

[15] *United States* v. *Pezzino*, No. 75-2305; *United States* v. *Pulliam*, No. 75-1382.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari in Nos. 75-509 and 75-513 (as to all petitioners except Sanders) should be denied and that action on the petitions in No. 75-500 and 75-513 (with respect to petitioner Sanders only) should be deferred until our petitions in *Bernstein* and *Donovan* are acted upon, and then disposed of in accordance with the decisions in those cases.

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JANUARY 1976.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, APPELLEE

v.

KALE KALUSTIAN,	(74-3314)
PATRICK DALE POND,	(74-3315)
STANLEY NORMAN GRAY,	(74-3305)
DAVID SELDITCH,	(74-3264)
OTTO VINCENT MARINO, LEOPOLDO OBEZO,	
MABLE LINDA CUCCIA,	(74-3265)

APPELLANTS

OPINION

Filed Aug. 4, 1975 [*]

Appeal from the United States District Court for the Central District of California

Before: ELY and HUFSTEDLER, Circuit Judges, and SKOPIL, District Judge *

SKOPIL, District Judge:

Appellants seek review of their convictions for illegal gambling activities. 18 U.S.C. §§ 1955 and 2. They claim their motions for suppression of evidence

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* Honorable Otto R. Skopil, Jr., United States District Judge for the District of Oregon, sitting by designation.

[*] As amended December 11, 1975. Bracketed material has been added in amended opinion, and bold face material has been omitted.

were improperly denied. They also argue that there was insufficient evidence to sustain the verdicts.

According to the Government, confidential informants "advised" federal agents in 1971 that defendant Kalustian was operating a bookmaking operation from the Topper Club (Club) in Rosemead, California. Defendants Pond and Marino, among others, were identified as agents for the operation. On December 20, 1971, the Department of Justice sought court orders authorizing wire taps on three telephones at the Club one at defendant Stempke's residence, and one at the residence of Patricia Johnson. The application was authorized by Attorney General John Mitchell and granted on December 20, 1971. 18 U.S.C. § 2518(1)(c) provides that such applications shall include

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The Government attempted to fulfill that requirement through affidavits supplied by Special FBI Agent James Brent (Affidavits), which essentially contained the following representations:

> "The informants named herein have all said that they will not testify to information they have provided, even if granted immunity. * * *
> "Experience has further established that even though telephone toll records are available which indicate a person is engaged in illicit gambling,

> the records themselves are not sufficient to prove the gambling activities. Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case and would only succeed to a limited degree in establishing that Kale Kalustian, also known as Kelly, Patrick Dale Pond, Otto Vincent Marino, Patricia Jackson, Bill Stempke, and others as yet unknown, are involved in gambling activities over the telephone subscribed to in the name of the Topper Club. * * *
> "Furthermore, such investigative techniques as physical surveillance and the records obtainable on Kale Kalustian, also known as Kelly, Patrick Dale Pond, Otto Vincent Marino, Patricia Jackson, Bill Stempke, and others as yet unknown, contain little probability of success in securing presentable evidence. Based upon my knowledge and experience as a Special Agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other Special Agents who have conducted investigation of gambling activities, normal investigative procedures appear to be unlikely to succeed in establishing that the above individuals are involved in gambling activities over the aforementioned telephones in violation of Federal laws. My experience and the experience of other Agents has shown that gambling raids and searches of gamblers and gambling establishments have not, in the past, resulted in the gathering of physical or other evidence to prove all elements of the offense. I have found through my experience and the experience of other Special Agents, who have worked on gambling cases, that gamblers

frequently do not keep permanent records. If such records have been maintained, gamblers, immediateiy prior to or during a physical search, sometimes destroy the records. Additionally, records that have been seized in past gambling cases have generally not been sufficient to establish elements of Federal offenses because such records are difficult to interpret, and many times are of little or no significance without further knowledge of the gamblers' activities. Therefore, the interception of these telephone communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove violation of these statutes. * * *

"Wherefore, because of the existence of facts and underlying circumstances of the continuing investigation listed above in paragraphs 4 through 32b, I submit that the probable cause as submitted in paragraphs 3a, 3b, and 3d exists; that the extensive normal investigative procedures tried, as set forth in paragraphs 4 through 32b, have failed to gather evidence necessary to sustain prosecution for violation of the offenses enumerated in paragraph 3a, and reasonably appear unlikely to succeed; * * *"

Appellants contend that their motions to suppress the wiretap evidence should have been granted because the Government's application did not satisfy 18 U.S.C. § 2518(1)(c). They argue that the supporting affidavits contain bald conclusions rather than facts from which the Attorney General and the judge could determine whether "normal investigative procedures" were viable alternatives to electronic surveillance. § 2518(3)(c).

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Act), 18 U.S.C. §§ 2510 et seq. absolutely prohibits electronic surveillance by the federal government except under carefully defined circumstances and after securing judicial authority. Procedural steps provided in the Act require strict adherence. *United States* v. *Giordano*, 94 S.Ct. 1820, 416 U.S. 505 (1974). The importance of these procedures reflects the dual purpose of Title III, which is to

> "(1) [protect] the privacy of wire and oral communications and (2) [delineate] on a uniform basis the circumstances and conditions under which the interception of the wire and oral communications may be authorized." S. Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Admin. News 2112, 2153 (hereinafter cited as "History").

Title III was written to create limited authority for electronic surveillance in the investigation of specified crimes thought to lie within the province of organized criminal activity. History, pp. 2153-2163. It was designed to conform to prevailing constitutional standards. *Berger* v. *New York*, 388 U.S. 41 (1967); *Katz* v. *United States*, 389 U.S. 347 (1967). The restraint with which such authority was created reflects the legitimate fears with which a free society entertains the use of electronic surveillance. As stated in *Berger*, *supra*, "Few threats to liberty exist which

are greater than that posed by the use of evesdropping devices." 388 U.S. at 63.

Section 2518(1)(c) of the Act

> "is patterned after traditional search warrant practices and present English procedure in the issuance of warrants to wiretap by the Home Secretatry. [citation omitted] The judgment [of the judge or magistrate] will involve a consideration of all the facts and circumstances. * * * Merely because a normal investigative technique is theoretically possible it does not follow that it is likely. *See Giancana* v. *United States*, 352 F.2d 921 (7th Cir. 1965), cert. denied 382 U.S. 959; *New York* v. *Saperstein*, 2 N.Y. 210, 140 N.E.2d 252 (1957). What the provision envisions is that the showing be tested in a practical and commonsense fashion. Compare *United States* v. *Ventresca*, 380 U.S. 102 (1965)." History, p. 2190.

Our review of the wiretap authorization is limited. We are reminded that

> "[w]here [the underlying circumstances in the affidavit] are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *United States* v. *Ventresca, supra* at 109.

Within our prescribed limits, however, the utmost scrutiny must be exercised to determine whether wiretap orders conform to Title III. The Act has been

declared constitutional only because of its precise requirements and its provisions for close judicial scrutiny. *United States* v. *Bobo*, 477 F.2d 97 (4th Cir. 1973); *United States* v. *Cox*, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); *United States* v. *Cox*, 462 F.2d 1293 (8th Cir. 1972). Our review of wiretap orders must ensure that the issuing magistrate properly performed his function and did not "serve merely as a rubber stamp for the police". *Ventresca, supra* at 109.

The affidavits set forth facts from which probable cause to infer the operation of a gambling conspiracy could be gleaned. Nearly all of these "facts" trickled into the ears of FBI agents through a series of professional gamblers and bookmakers **moonlighting as stoolies for the Government. This colorful procedure of shuffling through stacks of hearsay and double hearsay reports from the "underworld" to construct an affidavit prompts some intriguing ethical questions.** Unfortunately, as the affidavits attest, none of the Government's underworld informants are willing to testify. [The refusal of the informants to testify is a matter for the court to consider in authorizing electronic surveillance. However, standing alone, it may not be sufficient.] Evidence of the telephone numbers used by the bookmaking operation and the identities of some of the conspirators could not successfully support a prosecution without that testimony.

Consequently the investigating officials decided electronic surveillance was imperative. They discarded

alternative means of further investigation because "knowledge and experience" in investigating other gambling cases convinced them that "normal investigative procedures" were unlikely to succeed. Agent Brent recites that searches are often fruitless because gamblers keep no records, destroy them, or maintain them in undecipherable codes. Use of the phone company's records alone is inconclusive.

The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case. In effect the Government's position is that all gambling conspiracies are tough to crack, so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance. Title III does not support that view.

> "Congress legislated in considerable detail in providing for applications and orders authorizing wire tapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. *These procedures were not to be routinely employed as the initial step in criminal investigation.* Rather, the applicant must state that and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." *United States* v. *Giordano, supra.* (emphasis added)

The Government's position is further undermined by the activity of other crime-fighting organizations. California, among other states, deprives its policemen of electronic surveillance in all cases. This has not prevented them from successfully prosecuting gambling crimes.

Obviously electronic surveillance can facilitate criminal investigation. Other investigative techniques are usually slower and more difficult. Unless they "have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous", however, Title III does not allow wiretapping to replace them.

The Government failed in this case to satisfy 18 U.S.C. § 2518(1)(c). Its application did not adequately show why traditional investigative techniques were not sufficient in this particular case. A reviewing judge is handicapped without a full and complete statement of underlying circumstances. The Government must (1) inform him of every technique which is customarily used in police work in investigating the type of crime involved, and (2) explain why each of them has either been unsuccessful or is too dangerous or unlikely to succeed because of the particular circumstances of that case. Title III and the individual's right to privacy which it seeks to preserve demand no less.

[Obviously electronic surveillance can facilitate criminal investigation. Because other investigative techniques are usually slower and more difficult, Con-

gress did not require exhaustion of "all possible" investigative techniques before orders for wiretaps could be issued. *U.S.A. v. Smith*, —— F.2d —— (9th Cir., July 2, 1974). But Title III does not allow wiretapping to replace such other techniques unless they "have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous".

The Government failed in this case to satisfy 18 U.S.C. § 2518(1)(c). Its application did not adequately show why traditional investigative techniques were not sufficient in this particular case. A judge reviewing a wiretap application is handicapped without such a showing. Title III and the individual's right to privacy, which it seeks to preserve, demand no less than a full and complete statement of underlying circumstances.]

Mere conclusions by the affiant are insufficient to justify a search warrant, *Aguilar* v. *Texas*, *supra*, or a wiretap order. More specifically, they do not provide facts from which a detached judge or magistrate can determine whether other alternative investigative procedures exist as a viable alternative.

The trial court's order denying appellants' motions for suppression of electronic surveillance evidence is reversed, and all consolidated cases are remanded for a new trial. All evidence gathered through electronic surveillance pursuant to the original § 2518 order and its extensions shall not be admitted in subsequent proceedings.

In view of that ruling, the other issues on appeal are not reached.

REVERSED and REMANDED.

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